IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.659 OF 2001

Shivaji Tukaram Mote,
Convict Prisoner No.C-11901,
Yeravada Central Prison,
Pune-6. .... Appellant

- Versus -

The State of Maharashtra .... Respondent

Shri Arfan Sait, Advocate (appointed) for
the Appellant.

Smt. V.R. Bhonsale, Addl. Public Prosecutor,
for the Respondent-State.

CORAM: N.V. DABHOLKAR &
Smt.V.K. TAHILRAMANI, JJ.

DATED: FEBRUARY 02, 2006

ORAL JUDGMENT (Per N.V.Dabholkar, J.):

1. The appellant/accused Shivaji Tukaram Mote is aggrieved by the Judgment and Order dated 19-3-2001 delivered by Additional Sessions Judge, Pandharpur in Sessions Case No.11 of 2000. By the impugned Judgment, he is held guilty for offences punishable under Sections 302, 506 of the Indian Penal Code (IPC) and sentenced to suffer life imprisonment and RI for one year on respective counts. In addition, fine of Rs.500/- is imposed so far as offence of murder is concerned. In case of default to pay fine, he is ordered to undergo further RI for one month.

2. The prosecution story can be narrated in brief as follows:

Deceased Laxman Pandurang Sargar and the accused are residents of Udanwadi, Taluka Sangola, District Solapur. In fact, they are residents of the same vicinity in the said village. Deceased Laxman is the maternal cousin of father of the complainant, namely Uttam Valekar (PW-4). The deceased at the material time was Chairman of Saibaba Dairy, which was a co-operative society.

The incident in question took place on 8-12-1999 at about 8:00 p.m.. According to the prosecution, there was a background prologue incident that occurred on the same day, an hour earlier to the incident in question. At that time complainant Uttam and deceased Laxman were sitting at the premises of Saibaba Dairy and were discussing about milk collection. Simultaneously the work of milk collection was in progress. The accused approached them and picked up a verbal exchange with Laxman. The accused expressed grievance to Laxman, saying that Laxman was not acting in the interest of poor people and he had managed to get the name of the accused deleted from the list of homeless people of the village. The accused departed after according threat to

deceased Laxman that he would ensure that Laxman does not survive on that day.

After the work at the dairy was over, Laxman started for his residence. He requested complainant Uttam to accompany him upto the residence and then to proceed to his own house. The two were walking down. At about 8:00 p.m. they arrived near the house of the accused, same location is also described as near the house of one Chandu Gade. It is said that the accused charged towards the victim, armed with a knife in his hand. There was a scuffle between the two for about five minutes during which the deceased had pushed the accused and the accused fell in the thorny bushes of acacia. During the scuffle, the accused dealt knife blows to the victim on his chest, left axilla and also on the head. Victim Laxman collapsed. During the scuffle Shirmabai Sargar, sister of the victim (PW-5) and wife of the accused, namely Kamal had also arrived on the scene. Shirmabai in her attempt to intervene for the purpose of saving her brother also sustained an injury as a result of brushing of the knife.

The complainant and others carried the victim to Government hospital, Sangola where the Medical Officer examined and declared him dead. Immediately thereafter PW-4 Uttam approached the police station, Sangola and

reported the matter, which was registered as the FIR (Exhibit-39). The investigation was carried out by PW-7 Sahaji Jadhav, then A.P.I. attached to Sangola police station and on completion of the investigation, he filed the chargesheet in the Court of the Magistrate. The Sessions trial that proceeded after committal, has ended in conviction as above.

3. Apart from complainant Uttam (PW-4) and sister of the victim Shirmabai (PW-5), the prosecution has examined one more eye-witness, namely, Annasaheb Korake (PW-6). According to narration of Annasaheb, he has witnessed the background incident that occurred at about 7:00 p.m. near the Saibaba Dairy and also the incident in question, although from some distance. According to him, when the incident in question occurred while Laxman and complainant Uttam were proceeding ahead by Udanwadi-Rajuri road, he was following them at a distance of about 20 feet. Thus, on both the occasions he has witnessed the incident from quite a close distance.

The remaining three witnesses are technical witnesses, who have rendered assistance in the investigation. Dr. Malikarjun Pattanshetti (PW-1) had declared Laxman dead on admission. He also carried out the post-mortem after the dead body was referred to him

on registration of the offence. In the post-mortem note (Exhibit-24), he has recorded his opinion that the death had resulted because of cardio respiratory failure due to shock due to stab injury to heart and lung. In fact, Dr. Malikarjun had also examined Shirmabai and also the accused. The results of his clinical examination of these two individuals are on record in the form of injury certificates at Exhibit-25 and Exhibit-28 respectively. Shirmabai had suffered incised wound to her right middle finger, dorsally over middle phalanx. The accused had five injuries on his person. A contusion on right parietal region, multiple abrasion on scapula and there were abrasions on right forearm, left foot and chest. According to Dr. Malikarjun, the injuries of both these individuals were suffered within less than six hours prior to examination. The patients appear to have been examined at about 9:45 p.m. on the same day i.e. 8-12-1999.

PW-2 Balekhan Shaikh is a panch witness and the panchnama of the spot of occurrence (Exhibit-30) was drawn in his presence. PW-3 Digambar Shingade is another panch witness. According to the prosecution, the accused while in police custody, on 10-12-1999 made a statement which was recorded in the form of a memorandum between 07:00 to 07:10 hours and pursuant to information furnished, the accused also discovered the

weapon - knife from the thatched wall of his house. The panchnama to this effect (Exhibit-33) was drawn between 07:25 to 09:15 hours. PW-3 Digambar is witness to these events. From the statement of the accused, as recorded under Section 313 of the Code of Criminal Procedure, 1973, and the tenor of the cross-examination of the witnesses, it appears that the accused tried to claim right of self-defence of person. Unfortunately, the same is not claimed whole-heartedly. He has admitted relationship of complainant Uttam and PW-5 Shirmabai with the victim. He did not dispute that deceased Laxman was Chairman of Saibaba Dairy, a co-operative society. However, in response to question No.7 related to direct account of the incident as given by complainant Uttam, the accused has claimed that the victim and the complainant had come near his house and they started beating the accused. As a result of beating, the accused became unconscious and thereafter he does not know as to what happened since he had become unconscious (It is because of such approach that we have ventured to say that right of self-defence of person is pleaded half-heartedly). In response to question No.11, the accused has admitted a scuffle with the deceased but claimed that he was beaten by the deceased and he had become unconscious.

On reference to cross-examination of PW-4, it is

also suggested that there was some money transaction between the victim and the accused, that accused had been at the location of Saibaba Dairy for the purpose of claiming the amount due from the deceased. It is also suggested to PW-6 Annasaheb that during the scuffle, after the accused had become unconscious, some third person assaulted and killed Laxman. Taking the defence propositions on their own, we feel justified in observing that right of self-defence of person is not advanced whole-heartedly.

4. Heard Advocate Shri Arfan Sait for the appellant and Smt. V.R. Bhonsale, A.P.P., for the respondent-State. Shri Sait has taken us through the impugned Judgment and the evidence of major witnesses. In the light of the Judgment of the trial Court, Shri Sait has submitted that the trial Court was not justified in placing reliance upon the three eye-witnesses, firstly because that all of them were related to the victim and thus interested witnesses. According to him, the presence of PW-4 Uttam and PW-6 Annasaheb, at the alleged place and time, is doubtful. Shri Sait also tried to press into service the right of self-defence of person and in the alternative, he has not failed to submit that in case this Court arrives at the conclusion that the accused was the author of the injuries inflicted on the person of deceased Laxman, in that case the offence would

squarely fall within the ambit of Section 304 Part II and not under Section 302 of IPC.

5. On reference to impugned Judgment, it is evident that for the reasons discussed in paragraph Nos.7 and 8 by placing reliance upon the post-mortem notes and the inquest panchnama, the learned trial Judge arrived at the conclusion that the death was homicidal. According to him, the nature of the injuries ruled out the possibility of those being either accidental or suicidal, much less the death could be termed as natural. He has discussed the evidence of the three eye-witnesses - Uttam (PW-4), Shirmabai (PW-5) and Annasaheb (PW-6) and according to him, the evidence is reliable because they narrate a consistent story whereas the defence during the cross-examination has not been able to penetrate and demonstrate that they are unworthy of reliance. He has also drawn support from the evidence regarding discovery of weapon at the instance of the accused and the C.A. report. This is because the weapon is said to be stained with human blood of blood group "AB", which appears to be the blood group of the victim, since the clothes of the victim are also stained with human blood of the same group. The evidence of Shirmabai (sister of the accused) could not be doubted because she had suffered injury during her attempt to intervene.

The learned trial Judge felt that the defence theory was improbable . There was prompt reporting to the police by PW-4 Uttam. According to the learned Judge, the injuries on the person of the accused stood explained by the defence theory itself. We have also not been able to avoid a feeling that half-hearted defence raised by the accused has benefited the prosecution more than the defence itself. By such a defence, the accused has admitted his presence and his having entangled in a scuffle with the victim at the alleged place and time.

6. Although Advocate Shri Sait vociferously argued for recording a finding that the eye-witnesses are unworthy of belief, such a submission cannot be acceded to on the sole ground that they are interested witnesses. Shirmabai is the real sister of the victim. Even the defence does not dispute that she is residing with her brother, inspite of being a married lady, because she has deserted her husband. Merely being interested witnesses, because they are related to the victim would be no sufficient ground, although it has come on record that some crowd had gathered immediately after the incident and thus Advocate Shri Sait was justified in submitting that some independent witness could have been examined. Aloofness of individual to step into police

station as complainant or witness or to step into witness box in the Court of law as a witness, by now; is taken note of by the Hon’ble Apex Court and therefore merely because no independent witnesses are examined, is not sufficient to disbelieve the interested witnesses. Interested witnesses may have tendency to exaggerate or add spice to the prosecution story. In the process of separating the grain from the chaff, if the Court can successfully separate such exaggeration, the interested witness provides the entire truth. As rightly observed by the learned trial Judge, having gone through the cross-examination of these three witnesses, we have not been able to find any region by which we can say that the witnesses have shown tendency either to exaggerate or to tell lies. They were not required to be confronted with their statements under Section 162 of the Code of Criminal Procedure, 1973, recorded during the course of the investigation, either for the purpose of pointing out that they had omitted to narrate something which they were narrating before the Court nor for the purpose of pointing out that they are making a statement inconsistent with their earlier statement. If at all some blame is to be put on their shoulders, from the cross-examination, there appears some evasive attitude when questions were put, aimed at demonstrating that they are related, may be distantly and through matrimonial connections. We have weighed the evidence

of the three eye-witnesses by accepting the fact that they are related to the victim, may be with distant relationship and yet we are convinced that they are not witnesses of such calibre that their evidence can be thrown away as false narration or false implication of the accused. At the cost of repetition, we may say that presence of Shirmabai cannot be doubted since she claims to have intervened with the purpose to save her brother and in the process had suffered a cut injury to her right middle finger.

For the purpose of substantiating his argument that presence of PW-4 Uttam and PW-6 Annasaheb is doubtful, learned Advocate Shri Sait took us through the chief-examination of Shirmabai and more particularly para 2 regarding the actual incident. He pointed out that here Shirmabai has not referred to the presence of Uttam and Annasaheb and therefore it ought to be held that Uttam and Annasaheb may be persons who reached the location after the incident was over and they were not the eye-witnesses. Shri Sait also relied upon some portion in the cross-examination of Shirmabai wherein she has said "There were neighbouring people to intervene. There were about 3-4 people.".

We are unable to accept the submission of Advocate Shri Sait on the basis of scanty material

relied upon by him. Admittedly, Annasaheb was following Uttam and the victim after at a distance of 20 feet when Uttam and the deceased together were proceeding home. It is not claimed by Annasaheb that he intervened and therefore merely because Shirmabai, who had actually intervened, does not specifically refer as to who were present when the incident occurred, that by itself will not be sufficient to doubt the presence of these two witnesses. In fact, Shirmabai has referred to Uttam as one of the persons who accompanied the victim to the hospital. Shri Sait tried to boost his arguments by reference to evidence of Dr. Malikarjun, who claims that the patient was admitted to the hospital by Shirmabai and Kamal (sister and widow). No doubt, the Medical Officer has referred to couple of relatives of the victim as persons admitting the victim to the hospital. This will not be sufficient to rule out the presence of the other relatives or well-wishers of the victim. It is claim of Uttam that he not only accompanied the victim upto the hospital but after the victim was declared dead, he proceeded to police station, Sangola, and his first information is registered by PW-7 API Sahaji at about 10:30 p.m.

Even if we presume for the sake of arguments that Uttam and Annasaheb were persons who reached the location immediately after the incident, yet the

evidence of Shirmabai, who has suffered an injury in an attempt to rescue her brother, cannot be brushed aside. We are convinced that the trial Court committed no error in placing implicit reliance on the testimonies of these three witnesses.

7. By virtue of Section 96 of IPC, nothing is an offence which is done in the exercise of right of private defence. Every person has a right, subject to restrictions contained in Section 99 to defend his own body and also body of any other person, as prescribed by Section 97 of IPC. However, right of private defence does not extend to inflicting more harm than necessary to inflict for the purpose of defence. By virtue of Section 102 of IPC, it is evident that right of private defence of the body commences as soon as a reasonable apprehension or danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and the same continues as long as apprehension of danger to the body continues.

In the matter at hand, Laxman has suffered death and on reference to Section 100 of IPC, there are only six categories in which right of private defence of body can extend to causing of death of the assailant. In order to claim right of self-defence, either for the

purpose of total exoneration or for the purpose of bringing the case to a less severe offence i.e. under Section 304 Part II of IPC, by saying that it was case of excessive use of force during the course of exercise of right of private defence, it was necessary for the defence to probabalise that victim Laxman was the assailant. Unfortunately, for Advocate Shri Sait for the appellant, the record of the trial Court does not provide him a platform for such an argument when the evidence of Uttam, Shirmabai and Annasaheb is found acceptable. All these three witnesses have also deposed about an incident that took place an hour prior to the alleged incident. During the earlier incident, the accused is said to have approached the victim while the victim was attending to milk collection on the premises of Saibaba Dairy. The accused is said to have picked up a quarrel, under the belief that deceased Laxman had managed deletion of name of the accused from the list of homeless persons of the village. No doubt, as in the trial Court, Advocate Shri Sait tried to point out that no record is produced in order to demonstrate that the accused was in the list and his name was deleted in the subsequent list. However, this does not make any difference nor the non-production of such a record can make the story narrated by the three eye-witnesses doubtful. All the three witnesses have admitted that the deceased was not the office bearer of any of the

institutions i.e. Z.P., Panchayat Samiti or the Village Panchayat. It can be mistaken belief of the accused that the deceased was instrumental to deletion of his name from the final list of the homeless villagers. The accused had not only picked up a quarrel with the deceased on that count but departed only after threatening Laxman of finishing him on the same day. Shirmabai has witnessed the accused sharpening knife on a stone and simultaneously uttering abuses towards the complainant. She had questioned him about the same and the accused is said to have repeated the threat to her that he was going to finish Laxman because Laxman had managed deletion of the accused's name from the list of the homeless people of the village. If this background is taken into consideration, it is difficult to accept the submission on behalf of the appellant that deceased Laxman and his companions might have entered the house of the accused, dragged him outside and thrashed him or that after such commencement of the incident the accused might have defended himself by using the knife. If the victim and his companions had so pounced upon the accused while he was unguarded at his residence, as rightly observed by the trial Court; he could not have had any time and opportunity to lay hands on the weapon and retaliate the attack with the assistance of the same.

8. The accused having admitted his presence and having had scuffle with the victim has made the task of the prosecution lighter. The fact situation, as described by the witnesses, does not show that right of self-defence of person had accrued in favour of the accused at the time he used the knife upon the victim. The accused himself is not certain about the defence story. As pointed out, during the cross-examination of the witnesses, it is suggested that the victim and his companions entered the house of the accused and they dragged him outside and thrashed him. Even thereafter the accused does not come out with a clean-breast statement that he attacked Laxman in the right of self-defence but he claims that as a result of beating, he became unconscious and thereafter some third person might have killed the victim. The story tried to be propounded by the defence, is not palatable.

No doubt, there are injuries upon the person of the accused and certificate regarding the same is produced by the prosecution at Exhibit-28. It can be seen that all the injuries are simple and as admitted by the Medical Officer, those could have been suffered during the course of a scuffle. While suggesting the right of self-defence, unfortunately; defence has got the injuries explained through the mouth of the eye-witnesses during the course of their

cross-examination. The witnesses have admitted that the victim had pushed the accused who fell in the thorny acacia plants and thus suffered abrasions on the back and scapula. Thus, this is not a case wherein the prosecution has tried to suppress or failed to explain the injuries on the person of the accused. Neither right of self-defence is made out nor the evidence on record can demonstrate that it is a case of excessive exercise of right of self-defence.

We are, therefore, unable to accede to his alternative submission as well.

9. For the reasons discussed hereinabove, the impugned Judgment calls for no interference. The appeal is hence dismissed.

The Registrar (Judicial) shall ensure supply of certified copy of this Judgment, free of cost, to the appellant in prison through the prison authorities.

Advocate Shri Arfan Sait was appointed at the cost of the State to conduct the appeal on behalf of the prisoner. We quantify his professional charges at Rs.2500/-.

(Smt. V.K.Tahilramani, J.) **(N.V.Dabholkar, J.)**